Filed 3/30/09 In re E.S. CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| In re E.S.,<br><br>a Person Coming Under the Juvenile Court Law. | B209439<br>(Los Angeles County<br>Super. Ct. No. CK41588) |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>M.G.,<br><br>Defendant and Appellant. | |

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline H. Lewis, Referee. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kirstin J. Andreasen, Associate County Counsel, for Plaintiff and Respondent.

Maria G. (Mother) appeals from the order terminating her parental rights to her son E.S., born November 1999. She contends that the order must be reversed, because the court did not inquire of her whether E.S. has American Indian heritage as defined in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1912, subd. (a)), and because the court failed to make a finding whether ICWA applied. We affirm.

## PROCEDURAL AND FACTUAL BACKGROUND

In February 2000, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition under Welfare and Institutions Code section 300 regarding three-month-old E.S. and four of his siblings.[1] The petition alleged that Mother maintained a detrimental home environment in that she exposed then three-month old E.S. to extremely toxic and volatile chemicals used to manufacture methamphetamine; the home was in a filthy, unsanitary condition; and Mother was incarcerated and unable to care for E.S.

In the application for the petition, DCFS marked the "no" box to the question: "Does child have American Indian heritage?" In the petition, DCFS left blank the boxes for each of these recitals: "Child may be a member of, or eligible for, membership in a federally recognized Indian tribe" and "Child may be of Indian ancestry."

On February 24, 2000, Mother, then incarcerated in county jail, made her initial court appearance. Because of a defect in the court reporter's disks, the reporter was unable to transcribe the notes of this proceeding. Thus, a reporter's transcript is not part of the record on appeal, and Mother has not sought to augment

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[1] All further section references are to the Welfare and Institutions Code unless otherwise indicated. Although the case originally involved the four siblings, they are not involved in this appeal.

the record with a settled or agreed statement. According to the court's minute order, Mother, who was assisted by a Spanish language interpreter, denied the petition's allegations. The court continued the matter for a pretrial resolution conference.

In its report for that conference, as in every other report for subsequent proceedings throughout the eight years the case was pending, DCFS stated that ICWA did not apply. Although present at many of these proceedings, and represented by counsel at all of them, Mother never objected to DCFS's statements that ICWA did not apply. Mother and Father's family history reflected solely Mexican heritage. Mother reported she was born in February 1969 in Tijuana, Mexico, and at about age 14 immigrated to the United States (Mother was not a legal resident). A copy of E.S.'s birth certificate listed Mexico as Mother's "state of birth." Jacqueline J., Mother's sister and E.S.'s maternal aunt (Aunt), reported she, too, was born in Mexico in 1973 and about 1992 immigrated to California. Jose S., E.S.'s alleged father (Father), reported he was born in Mexico in 1965, immigrated to California in 1981, and in 1987 received "his residency." Rosa I., Father's mother, reported she was a resident of Mexico.

Father had been in prison on drug-related charges since May 1999. At his first appearance in May 2000, Father responded "no" to the court's inquiry: "To your knowledge, does your side of the family have any American-Indian heritage?" Mother was also present, but added nothing to Father's response.

In May 2000, the court sustained the section 300 petition, and in July declared E.S. a dependent, removed custody from Mother, and ordered reunification services. The court also ordered E.S. placed with Aunt. At the 12-month review hearing in August 2001, the court terminated reunification services and set a section 366.26 hearing for December 2001.

At that hearing, the court found E.S. adoptable, but concluded that it would be detrimental for him to be removed from his siblings and from Aunt's home. The court ordered E.S. placed in a long-term foster care plan.

After several six-month review hearings, DCFS reported that Aunt expressed an interest in adopting E.S., and the court scheduled a new section 366.26 hearing for November 5, 2004.

At the scheduled hearing, Mother was not present. The court found she had been given notice of the hearing through publication, because her whereabouts remained unknown. Aunt and her husband reported to DCFS they were born in Mexico, owned a home in Pomona, and had raised E.S. since he was a baby. The court continued the matter to allow DCFS to provide a home study and contact information for Mother.

On December 3, 2004, Mother's attorney advised the court that Mother had been located. She was apparently living in Tijuana, Mexico, but gave a mailing address and telephone number (her brother's) in San Ysidro, California.

At a proceeding in April 2005, Mother was not present. DCFS reported, as it had consistently, that ICWA did not apply and provided the court with a new June 2004 adoption assessment, which indicated E.S. was "Hispanic." Neither the "yes" or "no" box was checked for the recital "ICWA inquiry made."

At the resumed section 366.26 hearing on May 12, 2005, Mother's attorney informed the court he was in contact with Mother and she still resided in Tijuana, Mexico. DCFS reported ICWA did not apply and that Mother had advised DCFS she wanted her children returned to her care.

When the section 366.26 hearing resumed on June 8, 2005, DCFS again reported ICWA did not apply. The court ordered E.S. to remain with Aunt in long-term foster care.

After several six-month review hearings, DCFS reported, in April 2007, that then seven-year-old E.S. continued to reside with Aunt and her husband, who were in the process of obtaining legal residency and wanted to adopt E.S. The court continued the hearing for notice of a proposed new section 366.26 hearing.

In a subsequent interim report, DCFS stated that it had not been able to interview Mother or Father, both of whom still resided in Mexico, but aunt and her husband related that E.S. had no American Indian ancestry. DCFS reported ICWA did not apply and requested the court make an ICWA finding, because none had been made.

At a hearing on March 25, 2008, the court responded to DCFS's request for an ICWA finding by commenting that "[b]oth Mother and Father told the court there was no American Indian heritage back in 2000." The court directed DCFS "to look at the case file instead to see if the children fall under [ICWA]." Mother's attorney informed the court that Mother, who was not present, opposed E.S. being adopted. The attorney did not assert that E.S. had American Indian ancestry. The court set a contested section 366.26 hearing for April 2008.

During the contested hearing, the court announced its intent to terminate parental rights and free E.S. for adoption. The matter was continued for a sibling visitation schedule. Finally, on May 21, 2008, the court found by clear and convincing evidence E.S. was adoptable and ordered termination of parental rights.

## DISCUSSION

1. *Inquiry of Mother Concerning American Indian Heritage*

Mother contends that the order terminating parental rights must be reversed, because the record does not reflect that the court ever inquired of Mother whether E.S. had American Indian heritage. We disagree.

If there is reason to believe that a child subject to dependency proceedings is an Indian child, ICWA (25 U.S.C. § 1912(a)) and its California counterpart (§ 224.2, subd. (b)) require notice to the child's Indian tribe of the proceeding and of the tribe's right of intervention. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1194-1195.) "California case law . . . has consistently held that a 'suggestion' that the child is an Indian child is sufficient to invoke notice. [Citations.]" (*Id.* at p. 1198.) The dependency court has a duty to inquire whether the child has or may have Indian heritage. (See §§ 224.3, subd. (a) & (b)(1), 224.2.) This inquiry duty is not grounded in ICWA (see 25 U.S.C. § 1901 et seq.). Rather, the duty arose with the adoption in 1995 of former rule 1439(d) of the California Rules of Court. (See *In re H.B.* (2008) 161 Cal.App.4th 115, 121 (*H.B.*) [neither ICWA nor federal regulations impose an inquiry duty; rather, "the source of the duty to inquire is not ICWA itself but rather former rule 1439(d), a rule of court implementing ICWA"].) The version in effect when Mother first appeared in this matter provided: "The court and the county welfare department have an affirmative duty to inquire whether [the] child for whom a petition under section 300 is to be, or has been, filed is or may be an Indian child." (Former rule 1439(d); see also, *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.)[2]

Mother does not contend E.S. has or may have American Indian heritage. She contends, rather, that the record does not reflect that the court ever inquired of

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[2] Former "[r]ule 1439(d) was amended *effective January 1, 2005* . . . to provide 'an affirmative *and continuing* duty to inquiry' into a child's Indian ancestry. (Italics added.)'" (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1429.) This requirement of an affirmative and continuing inquiry duty remains the law. (§ 224.3, subd. (a) ["The court [and DCFS] have an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care"]; see also, rule 5.481(a) ["an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480"].)

her whether E.S has or may have Indian heritage. She is incorrect. On appeal, the judgment is presumed correct, and Mother has the burden of providing an adequate record to determine whether error occurred. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

At a hearing on March 25, 2008, the court (the same court that had handled the case from the outset) responded to DCFS's request for an ICWA finding by commenting that "[b]oth Mother and Father told the court there was no American Indian heritage back in 2000." The court's statement thus asserts that an ICWA inquiry was made of both Mother and Father during the early proceedings of the case. Mother first appeared on February 24, 2000. No reporter's transcript of that proceeding is available, and Mother has failed to provide an agreed or settled statement as to what transpired. (See, e.g., *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [burden to show error by adequate record not met where appellant "is represented by counsel on appeal who, though the proceedings were not reported, did have available the means to perfect the record by agreed or settled statement"]; see former rule 37.1(d) [now rule 8.404(d) (juvenile appeal record on agreed or settled statement)]; see also, former rule 32.2 [now rule 8.344 (agreed statement)], and rule 32.3 [now rule 8.346 (settled statement)]; see generally, 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent & Child, § 713, p. 892, and Supp. at p. 270.)

It is true that the court's minutes of the February 24 proceeding do not reflect that the court made an inquiry under ICWA. But the same is true for the court's minutes of the May 5, 2000 hearing, when Father first appeared. Yet the reporter's transcript of Father's first appearance shows that the court, in fact, asked, "To your knowledge, does your side of the family have any American-Indian heritage?" Father responded "no." Of course, the reporter's transcript of the proceeding prevails over the minutes. (See *People v. Harrison* (2005) 35 Cal.4th 208, 226.)

Thus, we do not find the court's minutes of Mother's first appearance adequate to show that no ICWA inquiry was made, and Mother has failed in her duty to demonstrate error by settled or agreed statement in the absence of a reporter's transcript. Based on the court's assertion at the March 25, 2008 hearing, the record *does* demonstrate that the court made an appropriate inquiry of Mother, and that Mother responded that E.S. had no American Indian heritage. (See, e.g., *In re Kathy P.*, *supra*, 25 Cal.3d at p. 102 [where record did "not show whether Kathy consented to adjudication . . . or was advised of her right to have counsel, we will respect the presumption that official duty has been regularly performed (Evid. Code, § 664)"]; cf. *In re J.N.* (2006) 138 Cal.App.4th 450, 460-461 [record reflected court inquired of Father but not Mother about possible Indian heritage].)

In any event, even if the court did not inquire of Mother, the error was harmless. (*H.B.*, *supra,* 161 Cal.App.4th at pp. 121-122.) The record affirmatively demonstrates that E.B. is of Mexican heritage, and has no American Indian heritage. Indeed, both Father and Aunt (that is, Mother's sister) told DCFS that they were unaware of any American Indian ancestry. Mother has never contended that E.S. does have Indian heritage. Thus, it is not reasonably probable that Mother would have obtained a more favorable result in the absence of the asserted error. (See *id.* at p. 122 ["Absent any affirmative representation of Indian ancestry, either in the dependency court or on appeal, [mother's] statement to the social worker denying such ancestry and her failure to indicate any of her children may have Indian ancestry throughout the Department's lengthy involvement with this family fully support the conclusion any error by the juvenile court was harmless"].)[3]

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[3] Mother also contends that the record fails to show that DCFS inquired of Mother whether E.S. had Indian ancestry. Any error by DCFS, like any error by the court, was harmless.

2. *No ICWA Finding*

Mother also contends the parental termination order must be reversed, because the juvenile court failed to make a finding ICWA did not apply. Mother has forfeited her claim of error, because it is not supported by applicable argument or pertinent authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [“‘[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]’ [Citations.]”.)

In any event, Mother cannot prevail. Assuming (without deciding) that the court erred by failing to make an express finding that ICWA did not apply, Mother suffered no prejudice. As we have noted, the record affirmatively demonstrates that ICWA does not apply to E.S. Thus, any error in the court’s failure to expressly state that fact could not have affected the outcome.

**DISPOSITION**

The order terminating parental rights is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.